In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 723

ESTATE OF LENA R. ARENTS, UNITED STATES TRUST COMPANY OF NEW YORK, SOLE SURVIVING EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case presents the narrow question whether the provisions of the Joint Resolution of March 3, 1931,[1] applicable to transfers after March 3, 1931, and before June 7, 1932, would require the inclusion in the decedent's gross estate for federal estate tax purposes of the value of property placed in an inter vivos trust, where the decedent retained a contingent life estate in the income from the trust if she survived her husband.

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[1] The Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, provided as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

The decedent irrevocably established the trust on June 4, 1932, and transferred to it certain corporate securities and several insurance policies on the life of her husband. Under the trust instrument, the income from the securities was first to be applied to payment of the premiums on the policies, but all income in excess of that required for this purpose was to be paid to the decedent. If she survived her husband, the proceeds of the insurance policies were to become part of the corpus of the trust, and she was to receive the income produced by these proceeds and by all the securities for the remainder of her life. If the husband survived the grantor, he was to receive for the remainder of his life the income from the securities in excess of that portion required to pay the insurance premiums. On the death of the surviving spouse, the corpus was to be distributed to their son, if then living, or, if he was dead, to his distributees as defined by New York law (R. 23–29, 56–57).

The decedent grantor died on March 11, 1954, survived by her husband. During her life, 28.93 percent of the net income from the securities subject to the trust was used to pay the insurance premiums. Peti-

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the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

tioner conceded in the Tax Court that the value of the securities in excess of the amount required to pay the premiums on the life insurance policies was properly includible in the decedent's taxable estate since, as to that portion of the securities, she had reserved an immediate life estate (R. 23, 29, 31, 59). As to the insurance policies and the securities which produced the income used to pay the insurance premiums, petitioner contended that the decedent had only a contingent life estate in this property and that therefore they were not includible in the taxable estate. The Tax Court agreed with petitioner and held that the decedent did not retain any right to the possession or enjoyment of either the life insurance policies or of the portion of the securities required to pay the premiums, and therefore that the value of neither the policies nor of that portion of the securities was includible in the decedent's gross estate (R. 32-51). The court of appeals reversed (R. 55-65).

Since the property was transferred after March 3, 1931, and before June 7, 1932, under the terms of Section 811(c)(1)(B) of the Internal Revenue Code of 1939,[1] it is includible in the decedent's taxable

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[1] SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * *

(c) [As amended by Sec. 7(a) of the Act of October 25, 1949 (Technical Changes Act of 1949), c. 729, 63 Stat. 891, and

estate only if the Joint Resolution of March 3, 1931, *supra*, so provides. The language of the Joint Resolution providing that "a transfer under which the transferor has retained for his life or any period not ending before his death * * * the possession or enjoyment of, or the income from the property," renders taxable a secondary life estate contingent upon the death of a prior life tenant. Certainly, if the grantor had survived the intermediate life tenant, the secondary life estate would have been taxable under the Resolution on the death of the grantor. As the court below held, the Resolution provides no basis for any distinction between a situation in which the intermediate life tenant survives the grantor and the situation here in

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by Sec. 207 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615]. *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom: * * *

* * * * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931, (46 Stat. 1516).

which he did not. "[T]he tax status of the transferred property is determined by the character of the transfer, and not by subsequent events" (R. 59).

The principal basis for the petitioner's petition for certiorari is the conflict between the decision below and that of the Fifth Circuit in *Hubbard's Estate* v. *Commissioner*, 250 F. 2d 492.[1] While we do not dispute that the conflict exists, we submit that it raises no issue of general importance warranting review by this Court. It seems settled that the language of Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169,[2] (effective after June 26, 1932) later incorporated in Section 811(c)(1)(B) of the 1939 Code and Section 2036 of the 1954 Code, includes in the taxable estate a life interest contingent upon the death of a prior life tenant, such as is here involved. *Commissioner* v. *Nathan's Estate*, 159 F. 2d 546 (C.A. 7); *Marks* v. *Higgins*, 213 F. 2d 884 (C.A. 2). See

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[1] Appeal was taken to the Second Circuit by the Commissioner because the amount involved was substantial. The estate tax deficiency determined by the Commissioner was $270,672 and the amount actually in controversy is $172,236.21.

[2] Section 803 provides as follows:

SEC. 803. FUTURE INTERESTS.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property * * *."

tion 803 not only includes property within the gross estate where the decedent retains the right to income "for any period which does not in fact end before his death"—which is almost the same language as in the Joint Resolution—but also includes property where the decedent has reserved income "for his life or for any period not ascertainable without reference to his death." Thus, the issue in this case cannot arise except as to transfers subject to the Joint Resolution, namely, transfers made within the approximately fifteen-month period after March 3, 1931, and before June 7, 1932.

The Chief Counsel of the Internal Revenue Service informs us[5] that the instant issue is not involved in any cases pending in the courts, and is in-

[5] The information is in a letter dated March 20, 1962, which reads as follows:

"In reply to your letter of February 20, 1962, it is the recommendation of this office that taxpayer's petition for certiorari in the above-entitled case be opposed despite the existence of a conflict with *Estate of Hubbard* v. *Commissioner* (C.A. 5 1958) 250 F. 2d 492, as the issue would appear to not have sufficient administrative importance.

"A survey of the various offices of the Regional Counsel discloses that no cases involving the instant issue are pending. A survey of the office of the Assistant Regional Commissioners (Audit) discloses the Philadelphia Region has one case with a $15,000 deficiency. There is also one case under examination in the Providence District of the Boston Region with a deficiency of $595,000. The Audit Division of the National Office advises that the amount in controversy in the instant case before the Supreme Court is $172,236.21. Despite the fact that $782,236.21 of deficiencies are involved in the instant case and the other two cases mentioned above, the pertinent statute involves transfers made after March 3, 1931, and before June 7, 1932, and thus is not of continuing importance."

volved in only two instances on the administrative level. There is no certainty that either of these instances will ever be litigated, and, including the amount in controversy here ($172,236.21), a maximum of $782,236.21 of deficiencies is involved in all three cases. Few additional cases are likely to arise in the future since the question is pertinent only to a narrow group of transfers made within a fifteen-month period approximately thirty years ago. We therefore respectfully submit that the issue has no continuing administrative importance requiring resolution by this Court and that therefore the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
I. HENRY KUTZ,
CAROLYN R. JUST,
Attorneys.

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